



## Canada-United States Law Journal

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Volume 17 | Issue 2

Article 19

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January 1991

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### Recommended Citation

Malcolm E. Wheeler, *Comparative Aspects of Dispute Resolution in Particular Subject Areas: Product Liability*, 17 Can.-U.S. L.J. 359 (1991)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol17/iss2/19>

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## Comparative Aspects of Dispute Resolution in Particular Subject Areas: Product Liability

*Malcolm E. Wheeler\**

**T**his paper will discuss the different forms of alternative dispute resolution used in the United States in the product liability context. At the beginning, however, it is important to note a few crucial differences between product liability litigation in the United States and product liability litigation in Canada.

First, in the United States, juries are almost always requested; in Canada, they are rarely requested. Second, in the United States, plaintiffs' lawyers operate on contingent fee; in Canada, they do not. Third, the United States has a particularly strict form of product liability. In California, for example, the burden of proof has actually been shifted to the manufacturer in applying the risk-utility test for design defects.

In the United States (especially in states such as California, Texas, Florida, and New Jersey) punitive damages are very common; in Canada, they are not. In fact, in Texas and California, juries in product liability cases have awarded punitive damages which exceed \$100 million. While judges, exercising their discretion, often remit excessive awards, the remitted sums still remain substantial.

Several forms of intangible harm are judicially cognizable in the United States, but not in Canada. When intangible harms such as hedonic damages (the loss of enjoyment of life), the child's loss of parental care and comfort, the parental loss of a child's care and comfort, disfigurement, embarrassment, and other itemized forms of intangible harm are listed in jury instructions, higher jury verdicts naturally result.

Finally, several states in the United States have a doctrine called "market-share liability." Under this doctrine the plaintiff need not prove that the defendant manufactured and sold the particular product that caused the plaintiff's harm. Although there are several versions of the doctrine, it essentially provides that the burden of proof shifts to the defendant on the issue of causation if the plaintiff shows that the manufacturer was one of the manufacturers in that industry, that the product was fungible, and that the defendants had a substantial share of the relevant market.

In summary, the simple fact is that in the United States, and, in particular, in a few jurisdictions within the United States, there is a wide range of factors that cause product liability litigation to be much more

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attractive to plaintiffs in the United States than in Canada. The number of variables, many of which are imponderables, in product liability cases in the United States plays a significant role in whether a party utilizes ADR techniques to resolve its case. How, for example, can a neutral advisor in a mini-trial or a mediator predict or estimate how a jury will value a parent's loss of care and comfort from a child who has been injured or killed? Or how a jury will value the embarrassment that comes from disfigurement? Or what number a jury will place on hedonic damages?

It is also important to understand that when one discusses ADR in a product liability context, it is really not a unitary phenomenon. The most common product liability suit involves an injured individual suing a corporate manufacturer. There are, however, other types of product liability suits; for example, subrogated insurers pursue manufacturers or sellers — a business-versus-business context. In United States jurisdictions where one can bring a product liability action to collect for economic damages, as opposed to personal injury damages, there are also suits involving corporate plaintiffs versus manufacturers. In addition, there are insurance coverage disputes in a product liability context, as well as mass torts, such as an airplane crash, a hotel fire, a toxic spill, or a toxic waste dump. Whether alternative dispute resolution is practical, or even feasible, will depend largely on which of these types of product liability actions is in question.

Before I proceed to the final point, which is when ADR is used and which ADR techniques are most prevalent, I will catalogue the various types of dispute resolution that we encounter in the United States. The majority of product liability lawyers probably have not encountered a number of these. Those, however, who engage in "high-end" product liability work - the very serious litigation where there are multiple fatalities, or multiple serious injuries, or where it is a product-line defect, as opposed to just one particular item - do encounter all of these in one context or another.

First, of course, is formal litigation. Second, is legally required arbitration. That is, in a number of jurisdictions, certain categories of personal injury cases require the parties to engage in pretrial arbitration if they cannot resolve the cases on their own. The arbitration is usually non-binding (i.e., the party who loses the arbitration can ask for a trial *de novo* as a matter of right). The most common area in which compulsory arbitration is used is in the medical malpractice area. But it is also used in some jurisdictions in small product liability cases.

A third form of dispute resolution is what is called the summary jury trial. The summary jury trial is a non-binding trial in which the court impanels a jury, but instead of having a complete trial with evidence and witnesses, the court gives each side a limited time in which to make a presentation, usually by the lawyers. The jurors are not informed that it is not a real trial, but are told to deliberate and to come back with

a verdict. The idea, of course, is to give the parties some indication as to what a jury would likely do in a real trial.

The fourth form of dispute resolution is formal arbitration agreed to by the parties. Fifth is mediation, and sixth is traditional negotiation.

Seventh is what in California is called the “rent-a-judge” program. By statute the parties can agree to pay a retired judge to try their case. The judge has the same powers as a regular judge. He is appointed essentially as a master, but with full judicial powers to try the case, unlike typical master proceedings. The verdict that comes in (and it can be a jury trial) is treated exactly as though it had come in at the Los Angeles County courthouse, for example.

One of the most interesting forms of dispute resolution was conceived of by Professor Jeffrey O’Connell at the University of Virginia. His premise was that people who are severely injured are most concerned about knowing that they will be taken care of - that they are not going to languish and suffer because there is no one to give them medical help or provide them with food and assistance. The idea that he came up with is best presented by way of example. First, select a particular type of case, such as injuries to high school students in school football programs. In those cases, injured students had been suing the schools for inadequate coaching on how to tackle, or for not providing the right kind of helmet or on some other theory. Under Professor O’Connell’s approach, the school would enter into a contract with an insurance company. The contract would require that, upon receiving notification that a student in that school district had been injured playing football, the insurance company must go to the injured student’s parents and inform them of the existence of the contract and say:

We have a contract with this school district that requires us to come to you and tell you that we will offer you the following if you will release any claims that you might have arising out of this accident. What we will offer you is to pay all medical expenses as they accrue, and in addition pay lost income that this child may have as he grows older. We will cap the lost income payments at \$35,000, but with cost of living increases.

That summarizes the various forms of alternative dispute resolution. Next, I turn to the forms of alternative dispute resolution that work well in the typical product liability context. Arbitration sometimes works, but this is usually in small cases where it would simply be economically inefficient from both the plaintiff’s and the defendant’s point of view to go to a full-scale jury trial. From the defendant’s point of view, the primary motivation is to save litigation costs. From the plaintiff’s point of view, the primary benefit is the quick recovery of money.

The “rent-a-judge” program will work if the defendant is willing to pay the rent-a-judge’s fee, which could be substantial. For example, in order to hire one of the truly outstanding retired judges in California, the

cost may be as high as \$300 per hour. Rarely will an individual plaintiff be willing to share in the cost of paying for a rent-a-judge.

Mediation is also used, but not commonly. In Michigan, and perhaps other states, there is compulsory mediation.

Negotiation is the oldest form of dispute resolution, and it is still the most common form used in the United States in a product liability context. There is, however, a dramatic change occurring in the nature of negotiation in product liability cases. In particular, it used to be the rule, almost without exception, that the defendant would wait for the plaintiff's lawyer to make a demand. It was thought to be a sign of weakness for a defendant to make an offer first. Given the escalation in the size of jury verdicts in a product liability case, the escalating cost of defense lawyer's fees in product liability cases, and the simple need of corporations to put these cases behind them as quickly and as efficiently as possible, in more and more instances defense lawyers are approaching plaintiffs' lawyers and making an offer very early in the litigation.

There are several reasons why this is happening. First, it tends to set reasonable boundaries for the playing field. For example, assume a case with a true settlement value of \$100,000. If the defendant waits for the plaintiff's lawyer to make an offer, the plaintiff's lawyer is likely to demand a million dollars. Then, even if they were to split the difference, the number would be at \$500,000 in a \$100,000 case. This makes fruitful negotiation difficult. Second, if the defendant can resolve the case early, it avoids discovery costs, intrusion on the corporation's officers and employees, and lawyer's fees. Third, an early settlement offer recognizes the plaintiff's need to receive security if it is a serious injury, or the plaintiff's desire to receive some money quickly rather than waiting for several years to see the first dime.

In sum, various forms of dispute resolution are being used in product liability litigation in the United States, but the primary form remains negotiation. As litigation has become more complex and costly, other forms of dispute resolution have been used more frequently. This trend seems likely to continue.